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Durham School Services, L.P. and International Brotherhood of Teamsters, Chauffeurs, Allied-Industrial and Service Warehousemen and Helpers Local Union No. 991. Case 15–CA–129463

December 4, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
AND SCHIFFER

This is a refusal-to-bargain case in which the Respondent is contesting the Union’s certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge and amended charges filed by International Brotherhood of Teamsters, Chauffeurs, Allied-Industrial and Service Warehousemen and Helpers Local Union No. 991 (the Union) on May 28, and July 7 and 22, 2014, respectively, the General Counsel issued the complaint on July 23, 2014, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union’s request to recognize and bargain following the Union’s certification in Case 15–RC–096096.¹ (Official notice is taken of the “record” in the representation proceeding as defined in the Board’s Rules and Regulations, Secs. 102.68 and 102.69(g). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer, admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On August 7, 2014, the General Counsel filed a Motion for Summary Judgment and Memorandum in Support of Motion. On August 11, 2014, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain but contests the validity of the certification on the basis of its objections to conduct alleged to have affected the results of the election in the representation proceeding. Further, relying on *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), the Respondent contends that the Board lacked a valid quorum at the time the petition was filed, when the election was held, and when the tally of ballots issued.

¹ Reported at 360 NLRB No. 108 (2014).

In addition, based on *Laurel Baye of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 473 (D.C. Cir. 2009), the Respondent also argues that the Board’s prior delegation of decisional authority in representation cases to Regional Directors lapsed when the Board lost a quorum. On these bases, the Respondent argues the Board must set aside the election, revoke the Union’s certification, and remand the representation case to the Regional Director with directions to conduct a new election.²

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

Accordingly, we grant the Motion for Summary Judgment.³

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a corporation with offices and places of business in Milton, Pace, and Navarre, Florida (Respondent’s Milton facility, Respondent’s Pace facility, and Respondent’s Navarre facility, respectively; collectively, Respondent’s facilities), and has been engaged in providing schoolbus transportation services to children.

Annually, the Respondent, in conducting its operations described above derives gross revenues in excess of \$250,000 and purchases and receives at its Milton, Pace, and Navarre, Florida facilities goods valued in excess of \$5000 directly from points outside the State of Florida.

² These arguments were raised and rejected in the underlying representation proceeding. See *Durham School Services, L.P.*, 361 NLRB No. 66 (2014) (Order Denying Motion for Reconsideration of the Board’s Decision and Certification of Representative).

³ The Respondent’s requests that the complaint be dismissed and a new election be directed are therefore denied.

Member Miscimarra dissented in part from the Board’s Decision and Certification of Representative in the underlying representation proceeding reported at 360 NLRB No. 108 (2014). He would have remanded the case for a hearing on Objection 1. While Member Miscimarra remains of that view, he agrees that the Respondent has not presented any new matters that are properly litigable in this unfair labor practice case. See *Pittsburgh Plate Glass Co. v. NLRB*, supra. In light of this, and for institutional reasons, Member Miscimarra agrees with the decision to grant the motion for summary judgment.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the representation election held on February 22, 2013, the Union was certified on May 9, 2014, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

INCLUDING: All full-time and regular part-time school bus drivers and monitors employed by the Employer at its Milton, Pace, and Navarre, Florida facilities.

EXCLUDING: All office clerical employees, maintenance employees, mechanics, dispatchers, routers, the safety coordinator, managerial employees, professional employees, guards and supervisors as defined by the Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. *Refusal to Bargain*

About May 12, 2014, the Union requested by letter that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the unit. Since about May 12, 2014, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit. We find that this failure and refusal constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since about May 12, 2014, to recognize and bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to recognize and bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided

by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); accord *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enf. 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enf. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964).

ORDER

The National Labor Relations Board orders that the Respondent, Durham School Services, L.P., Milton, Pace, and Navarre, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with International Brotherhood of Teamsters, Chauffeurs, Allied-Industrial and Service Warehousemen and Helpers Local Union No. 991 as the exclusive collective-bargaining representative of its employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

INCLUDING: All full-time and regular part-time school bus drivers and monitors employed by the Employer at its Milton, Pace, and Navarre, Florida facilities.

EXCLUDING: All office clerical employees, maintenance employees, mechanics, dispatchers, routers, the safety coordinator, managerial employees, professional employees, guards and supervisors as defined by the Act.

(b) Within 14 days after service by the Region, post at its facilities in Milton, Pace, and Navarre, Florida, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Re-

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

spondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 12, 2014.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 15 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 4, 2014

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD
APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO
Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with International Brotherhood of Teamsters, Chauffeurs, Allied-Industrial and Service Warehousemen and Helpers Local Union No. 991 as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, recognize and bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

INCLUDING: All full-time and regular part-time school bus drivers and monitors employed by us at our Milton, Pace, and Navarre, Florida facilities.

EXCLUDING: All office clerical employees, maintenance employees, mechanics, dispatchers, routers, the safety coordinator, managerial employees, professional employees, guards and supervisors as defined by the Act.

DURHAM SCHOOL SERVICES, L.P.

The Board's decision can be found at www.nlr.gov/case/15-CA-129463 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

